Nos. 98-1701, 98-1706

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

-and-

THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS (INTERTANKO),

Petitioner,

v.

GARY LOCKE, Governor of the State of Washington; CHRISTINE O. GREGOIRE, Attorney General of the State of Washington; BARBARA J. HERMAN, Administrator of the State of Washington Office of Marine Safety; DAVID MACEACHERN, Prosecutor of Whatcom County; K. CARL LONG, Prosecutor of Skagit County; JAMES H. KRIDER, Prosecutor of Snohomish County; NORMAN MALENG, Prosecutor of King County; NATURAL RESOURCES DEFENSE COUNCIL; WASHINGTON ENVIRONMENTAL COUNCIL and OCEAN ADVOCATES,

Respondents.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT-INTERVENORS

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TABLE OF CONTENTS

Contents

Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

Cited Authorities

STATEMENT OF THE CASE

Respondent-Intervenors request the Court to deny the two pending Petitions for Writ of Certiorari submitted by Petitioners Intertanko and the United States of America, Docket Nos. 98-1706 and 98-1701, respectively. Both Petitioners seek an order declaring that Washington State statutes pertaining to the operation of oil tankers in state waters and the state Best Achievable Protection Regulations (BAP) are unconstitutional. The Ninth Circuit correctly concluded that the regulations at issue are reasonable, non-discriminatory environmental protection measures under the state's inherent police powers. *Intertanko v. Locke*, 148 F.3d 1053, 1061 (9th Cir. 1998) ("*Intertanko II*").

A. Background.

On July 17, 1995 the International Association of Independent Tanker Owners (Intertanko) brought this suit for declaratory and injunctive relief against Washington state and local officials responsible for enforcing the BAP regulations. Shortly after the suit was filed, the Washington Environmental Council, Natural Resources Defense Council and Ocean Advocates intervened. On February 29, 1996, Intertanko requested that the United States intervene in support of their position that the BAP regulations was preempted by federal law. Letter from C. Jonathan Benner to RADM James C. Card, U.S. Coast Guard, dated February 29, 1996. The United States declined and played no part in the District Court proceedings.

On cross motions for summary judgment, the District Court ruled that the BAPs were not preempted by either federal or international law. The Court further ruled that the BAPs were specifically authorized by the Oil Pollution Act of 1990, Pub. L. No. 101-380, 104 Stat. 484 (1990) ("OPA 90"), and that the Coast Guard regulations which attempted to preempt them were beyond the scope of their statutory authority. *Intertanko v. Lowry*, 947 F. Supp. 1484 (W.D. Wash. 1996) ("*Intertanko I*"). The Court's judgment was entered on November 20, 1996. Intertanko filed a timely Notice of Appeal on December 11, 1996. On April

23, 1997, five calendar days before Intertanko's brief was originally due, the United States filed a Motion to Intervene. In the alternative, the United States indicated that it would file an amicus brief for which no leave of court was required. This motion was granted over Intervenor's objections that the motion was untimely.

The Ninth Circuit reversed the District Court's holding that specific Washington regulations which address the design and construction of an oil tanker are not preempted by federal law. *Intertanko II*, at 1066-67. However, the Court affirmed the District Court's judgment as to all other challenged BAP regulations. *Id.*, at 1069. The Ninth Circuit decision does not conflict with any other circuit. As explained below, its decision is entirely consistent with federal law.

B. The Oil Pollution Act of 1990, Section 1018.

Contrary to expressing its "clear and manifest" purpose to supersede the state's historic police powers, the clear language of OPA '90 provides for a savings clause or express non-preemption. In matters of statutory construction, it is appropriate to begin with the language of the statute itself. *See Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96 S. Ct. 1989, 1993, 48 L. Ed. 2d 540 (1976); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337, 99 S. Ct. 2326, 60 L. Ed. 2d 931 (1979). "[W]hen a statute speaks with clarity to an issue judicial inquiry into the statute's meaning, in all but the most extraordinary circumstance, is finished." *Estate of Cowart v. Nicklos Drilling Co.*, 505 U.S. 469, 475, 112 S. Ct. 2589, 120 L. Ed. 2d 379 (1992). The relevant statutory language appears as follows:

> (a) PRESERVATION OF STATE AUTHORITIES; . . . — **Nothing in this Act** or the Act of March 3, 1851, **shall —**
>
> (1) **affect, or be construed or interpreted as preempting**, the authority of any State or political subdivision thereof from imposing **any additional liability or requirements with respect to —**
>
> (A) **the discharge of oil** or other

> pollution by oil within such State; or
> (B) any removal activities in connection with such discharge;
> * * *
> (c) ADDITIONAL REQUIREMENTS AND LIABILITIES . . . — **Nothing in this Act**, the Act of March 3, 1851, or section 9509 of the Internal Revenue Code of 1986 . . . **shall in any way affect, or be construed to affect**, the authority of the United States or any State or political subdivision thereof —
> (1) to impose additional liability or **additional requirements**;
> * * *
> . . . **relating to the discharge, or substantial threat of discharge, of oil.**

OPA § 1018 (emphasis added). All parties agree that § 1018(a) grants to the states ample authority to impose their own standards of liability which differ from federal or international standards. Intertanko at 24-25, U.S. at 22. No additional statutory language is necessary to achieve this result.

It is clear that subsection (c) expanded the permissible scope of state action from that already provided in subsection (a), otherwise it would be merely superfluous. The authorization to impose additional requirements relating to a substantial threat of discharge is express authorization to the states to enact rules and regulations to prevent oil spills. The statutory inclusion of the word "prevention" is not an indispensable prerequisite to this authorization. The Plaintiff's interpretation of § 1018 would render subsection (c) superfluous and meaningless. Elementary cannons of statutory construction, however, foreclose that result. It is the " 'cardinal principle of statutory construction' . . . [that] [i]t is our duty 'to give effect, if possible, to every clause and word of a statute' . . . rather than to emasculate an entire section." *Bennett v. Spear*, 520 U.S. 154, 173, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997). "[C]ourts should disfavor interpretations of statutes that render language superfluous." *Connecticut Nat.*

Bank v. Germain, 503 U.S. 249, 253, 112 S. Ct. 1146, 117 L. Ed. 2d 391 (1992).

C. There exists a strong presumption against preemption. The historic police powers are not to be superseded absent a clear expression of Congressional purpose.

Although not acknowledged by Petitioners, there exists a strong presumption against preemption. *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 515-16, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992). In evaluating a federal law's preemptive effect, courts proceed from the presumption that the historic police powers of the state are not to be superseded by a federal act **"unless that [is] the clear and manifest purpose of Congress."** *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S. Ct. 1146, 91 L. Ed. 1447 (1947) (emphasis added). Quite simply, Congress has not clearly manifested its purpose to preempt efforts by the states to prevent oil spills. Just to the contrary, OPA 90 specifically authorizes the states to regulate to prevent oil spills.

The right of Washington to enact oil spill regulations concurrent and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment. The genius of federalism within the environmental context has been eloquently expressed by the Ninth Circuit as follows:

> Within our federal system, states are intended to be laboratories of experimentation in which various policies are debated, implemented and refined. The modern environmental movement started in the states. The federal government has followed the lead of the states, evaluating different state programs and borrowing the best ideas in order to form a comprehensive federal law. It is incongruous that in adopting the ideas that states have already developed, federal law should prevent further innovation by prohibiting states from expanding their environmental programs, be they regulation of

> hazardous materials transportation or other initiatives. By preempting state authority in this case, we effectively eliminate the ability of states to develop new and better ways of protecting the public health, safety and environment. And, we prevent innovative state programs from percolating up to the federal level.

The Chlorine Institute, Inc. v. California Highway Patrol, 29 F.3d 495, 499 (9th Cir. 1994).

D. International law does not preclude the right of Washington to enact reasonable, non-discriminatory environmental protection measures.

1. The treaty provisions relied upon by Petitioners are all non-self-executing.

Petitioners grossly distort the interplay between international and federal law. Petitioners summarily conclude that when the Federal Government accedes to an international treaty, that treaty automatically becomes the law of the land, thereby preempting any state action. Intertanko at 8. This novel assertion is contrary to a century of Supreme Court precedent. None of the applicable treaty provisions in the case at bar are self-executing, a necessity for the Supremacy Clause argument. *Restatement (Third) of Foreign Relations Law of the United States* ("*Restatement*"), § 131 (1987).[1]

1. The applicable treaties include the International Convention on Standards of Training, Certification, and Watchkeeping for Seafarers, as amended, London, July 7, 1978 (T.I.A.S.) ("STCW"), S. Treaty Doc. No. 96-1, C.T.I.A. No. 7624, the International Convention for the Prevention of Pollution from Ships, London, 1973, 12 I.L.M. 1319, and the Protocols of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, London 1978, 17 I.L.M. 546, as amended, with annexes (MARPOL 73/78), the Convention on International Regulations for Preventing Collisions at Sea, as amended (COLREG), London, October 20, 1972, 28 U.S.T. 3459, T.I.A.S. No. 8587, and the International Convention for the Safety of Life at Sea, as amended, with annexes and Protocol of 1978 (SOLAS) (16 UST 185, T.I.A.S. 5780; 32 UST 47, T.I.A.S. No. 9700; 32 UST 5577, T.I.A.S. 10009).

International vessel standards are unilaterally implemented on the domestic level by each signatory nation. None of the treaties "set" staffing, personnel training, qualifications, or oil tanker operations as asserted by Petitioners. *See, e.g.*, U.S. at 11. These treaties enunciate vague, minimal standards which cannot logically or legally rise to the level of the supreme law of the land; when treaty provisions before a Court are phrased in broad generalities, they cannot be self-executing. *Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 374 (7th Cir. 1985). A non-self-executing treaty provision does not afford rights which a court may apply to establish preemption. There are at least four relevant factors to be considered when determining whether a treaty is self-executing.

> (1) the purposes of the treaty and the objectives of its creators, (2) the existence of domestic procedures and institutions appropriate for direct implementation, (3) the availability and feasibility of alternative enforcement mechanisms, and (4) the immediate and long-range social consequences of self- or non-self-execution.

People of Saipan v. United States Department of Interior, 502 F.2d 90, 97 (9th Cir. 1974), *cert. denied*, 420 U.S. 1003 (1975). Throughout the history of this litigation, neither Petitioner has been able to provide any evidence that the treaties before the Court are of a self-executing character. *Intertanko I*, at 1490, n.3.

The United States decrees that the BAPs undermine the ability of the United States to conform to the international vessel management regime. There is an inherent flaw in this analysis: there is no corresponding international regime. For example, the STCW does not "prescribe" any training standards for signatory nations. The standards within STCW only provide instruction that a signatory nation should implement *some* form of training; as the Coast Guard recently confirmed, "[t]he [training] requirements of STCW must be implemented by each vessel's flag state." 61 FR 39775 (1996). These provisions

cannot constitutionally reign as the supreme law of the land without domestic implementation. *Restatement* § 131. Upon implementation, federal law, not the treaty, becomes the appropriate mechanism for preemption analysis. *Id.*

2. *Uniformity and reciprocity in vessel standards do not exist.*

Petitioners allege that the international scheme of oil shipping is guided by abstractions of reciprocity and uniformity. U.S. at 3. The inherent flaw within Petitioners' arguments of international uniformity and reciprocity lies in the non-self-executing character of the treaties at issue. Reciprocity and uniformity are amorphous international goals and do not exist in any recognizable order, and certainly not in practice. International vessel standards are all subjectively interpreted by each signatory nation. "[I]n a science as inexact as the interpretation of agreements, differences will inevitably emerge. To some extent these are due to differences in the approaches to interpretation of different legal systems." *Restatement*, § 325, Reporters' Note (4)(1987).

Individual flag-states unilaterally implement the treaties to suit their own interests, no nation can be "assured" that a vessel flagged by a signatory nation and entering local waters is in compliance with even a minimum international floor; these treaties set forth the least common denominator in vessel safety. *See generally* Donaldson, L., *Safer Ships, Cleaner Seas; Report of Lord Donaldson's Inquiry into the Prevention of Pollution from Merchant Shipping*. Supp. Excerpts at 1066.[2]

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2. The United States portrays the STCW as an international regime which establishes uniform international training standards. U.S. at 2. Even the Coast Guard recognizes this argument as meritless; the STCW is non-self-executing and ineffective to advance the interests of vessel safety: "[STCW] requirements . . . [are] too vague and [leave] too much to the discretion of Parties; [STCW displays] the absence of clear, uniform standards of competence; ineffective international [enforcement]; limited provisions for port state control; and outdated technical references." 61 FR 13284 (1996).

3. Federal vessel standards do not uniformly implement international standards.

Petitioners expose inherent contradictions in their uniformity arguments by alleging that OPA 90 was designed, in part, with the purpose of "creating" uniform non-preemption of state liability regimes. Intertanko at 5. OPA 90 did not "create" uniform federal law with respect to state liability regimes. The pre-OPA federal liability scheme already authorized unilateral state liability schemes, although not generally unlimited liability. *See* Intertanko at 5-6. A primary purpose of § 1018(a) was to authorize **non-uniform** liability regimes, with the opportunity for unlimited state liability. This was accomplished by OPA through the unequivocal U.S. abdication of international liability regimes.[3] U.S. accession to the international regimes would: (1) produce a cap on vessel spill liability and; (2) prevent the states from imposing their own liability regimes. *See* Mitchell, G., Sen. *Preservation of State and Federal Authority Under the Oil Pollution Act of 1990*, 21 Env'l L. 237 (1991). This was an option Congress refused to accept; "[t]he Senate voted unanimously to set much tougher federal liability standards than those established by the [international regimes], and to preserve the ability of states to retain and enact more stringent laws." Mitchell, at 250.

The United States argues that the Ninth Circuit placed undue reliance upon OPA § 4115 (requiring double hulls) to determine that uniformity is not Congress' fundamental purpose in oil tanker regulation. U.S. at 10-11. Contrary to this assertion, the lower Court had evidence of multifarious federal oil tanker regulations which are non-uniform and non-reciprocal on both the domestic and international level. *See Intertanko I*, at 1496-97. The lower Court Record is complete with these comparisons by Intertanko, the State, and Intervenors. *See, e.g., Intervenor's Response to Summary Judgment*, 26-40. The fictional nature of

3. Civil Liability Convention, 973 U.N.T.S. 3, 9 I.L.M. 45, and the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage 1110 U.N.T.S. 57, 11 I.L.M. 284.

uniformity and reciprocity in oil tanker standards is self-evident within federal regulations purporting to implement international provisions.

The United States argues, in part, that Title 46 U.S.C. Chapter 37 requires the Secretary to accept foreign vessel certificates of compliance, thereby implementing the international regime. U.S. at 5. Petitioner ignores the discretionary nature of the provision. Chapter 37 "requires" that "the Secretary **may** issue [a] certificate only after the vessel has been examined and found to be in compliance with this chapter . . ." 46 U.S.C. § 3711 (emphasis added). "This means that the Secretary **does not have to accept** foreign certificates of compliance." *Id.*, Historical and Revision Notes (emphasis added). Because of its discretionary nature, § 3711 does not implement any international provision.

The treaties generally provide that acceptance of foreign certificates of compliance are authorized unless there are "clear grounds [by the port-state] for believing that the condition of the ship . . . does not correspond substantially with the particulars of any of the certificates . . ." SOLAS Reg. 19(b). Each signatory nation unilaterally determines the meaning of "clear grounds" and what "particulars" are required to be followed. Title 46 provides the Secretary with complete discretion, regardless of whether the vessel's flag-state is a party to a particular treaty or not.

E. The police powers reserved to the states by the Tenth Amendment extend beyond state territorial jurisdiction.

Petitioners misconstrue the applicability of the BAPs to vessels transiting off the Washington Pacific Coast. To support the argument of improper extraterritorial jurisdiction, Petitioners suggest that oil tankers off the coast which are not bound for Washington waters are still subject to the BAPs. Intertanko at 11, U.S. at 28, n.15. This assertion is specious. The BAPs only apply to oil tankers that enter state waters. No oil tanker comes within the territorial waters of the United States, let alone the State of Washington, unless it is either: (1) headed for

Washington internal waters (i.e., the Strait of Juan de Fuca or the Columbia River); or (2) headed out of the Strait of Juan de Fuca or the Columbia River (thereby requiring that it had to have entered Washington internal waters).

Intertanko overstates the BAP extraterritorial qualifications; Intertanko argues that all oil tankers must comply with the requirements "in order to qualify for **eventual admission**" into state waters Intertanko at 12 (emphasis added).[4] In practice, Washington simply requires oil tankers which are destined for, or routinely enter, state waters to comply with the regulations. Determining precisely which tankers fall within the scope of Washington's police power is achieved through a reasonable 24-hour notice of entry requirement. *See* WAC 317-21-540.[5]

Oil spills are migratory. Under traditional police power analysis, a state may exercise its police powers outside of its offshore territorial jurisdiction when there is an integral nexus between the state's interest and the activity sought to be regulated. *Skiriotes v. Florida*, 313 U.S. 69, 61 S. Ct. 924, 85 L. Ed. 1193 (1941); *Askew v American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S. Ct. 1590, 36 L. Ed. 2d 280 (1973) ("sea-to-shore pollution [has been] historically within the reach of the police power of the States"); *Bayside Fish Flour Co. v. Gentry*, 297 U.S. 422, 56 S. Ct. 513, 80 L. Ed. 772 (1936)

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4. Petitioners ignore state rules for the conditional approval and/or waiver of BAP requirements when compliance would be unduly burdensome to a tanker. *See* WAC 317-21-410 and 317-21-510.

5. The advance notice report complements the voluntary 24-hour advance notice report required for all large commercial vessels before physically entering the state waters. In February 1998, the Canadian Coast Guard issued a VTS Revision detailing a voluntary 24-hour notice of entry for all vessels destined for the Strait of Juan de Fuca. *See* CVTS West Coast Approaches to Juan de Fuca Strait; Revision 2/98. "This one report will satisfy the Canadian VTS Offshore Report, the U.S. Notice of Arrival Report, and the State of Washington Advance Notice of Entry Report." *Id.* The Canadian Coast Guard is encouraging advance report compliance in accord with WAC 317-21-540. Any alleged and undocumented Canadian complaints are rendered suspect when viewed in conjunction with official Canadian actions.

(California law prohibiting certain fish from being caught inside or outside of state waters and brought into the state); *Laker Airways v. Sabena Belgian World Airlines*, 731 F.2d 909, 923 (D.C. Cir. 1984) (regulations governing extraterritorial activities which are designed to prevent impacts within the state are "not an extraterritorial assertion of jurisdiction"). Before oil tankers which are seaward of Washington's territorial domain actually enter the Strait of Juan de Fuca or the Columbia river, the economy and environment of the state remain subject to damage from an offshore oil spill. The BAPs do not affect the legality of international vessel standards, but rather protect state waters and resources.

REASONS FOR DENYING THE WRIT

I. THE BAPS PROMOTE THE PURPOSES AND OBJECTIVES OF CONGRESS.

The fundamental character and purpose of OPA 90 is to prevent oil spills.[6] After the *Exxon Valdez* disaster, Congress recognized that only a broader joint partnership between the federal government and the states could prevent future oil tragedies. Prior to the *Exxon Valdez*, prevention of oil spills was achieved primarily through federal measures within the Ports and Waterways Safety Act, 33 U.S.C. §§ 1221 *et seq.* and the Port and Tanker Safety Act, 33 U.S.C. §§ 1321 *et seq.* (PWSA/PTSA), and Title 46, all of which principally govern tanker design and construction. The PSWA/PTSA and Title 46 did not, and could not, effectively prevent oil spills. In the true spirit of federalism, Congress enacted OPA 90 with the intent of revolutionizing and enhancing these prior Congressional measures expected to prevent oil spills. As reflected by the *Exxon Valdez* spill and Congressional action in OPA 90, those prior measures proved to be a failure.

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6. "[A]ny oil spill, no matter how quickly we respond to it or how well we contain it, is going to harm the environment. Consequently, *preventing* oil spills is more important than containing and cleaning them up quickly." S. Rep. No. 94, 101st Cong., 2nd Sess. 2 (1989) *reprinted in* 1990 U.S.C.C.A.N. 722, 723 (emphasis added).

The federal statutes and international treaties cited by Petitioners are all fundamentally maritime in character. The standards within these statutes and treaties are designed with the purpose of protecting national and international waterways from oil pollution by addressing exclusively maritime concerns. The prevention of pollution in these regulations is secondary to their primary objective: navigational capabilities and structural controls. Congress left tangible environmental protection requirements to other appropriate mechanisms of control, specifically complementary federal and state oil spill prevention mechanisms. Police power regulations designed to prevent pollution, but which incidently affect operational procedures, pose no "material prejudice to the characteristic features" of maritime law.[7]

A. There is no conflict between the BAPs and international or federal standards.

The operational measures addressed by the BAPs pose no conflict with analogous federal regulations or international standards. WAC 317-21-200(1)(a) perfectly illuminates this conclusion. The United States argues that WAC 317-21-200(1)(a), which provides for watchkeeping practices, displays the international and domestic "inconsistency" of the BAPs. U.S. at 17. The U.S. argument misrepresents the actual language of the federal and international standards. Coast Guard regulations are not precisely defined and there are no defined international standards. More importantly, the federal regulations do not afford protection for unique local conditions.[8]

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7. *See American Dredging Co. v. Miller*, 510 U.S. 443, 985, 114 S. Ct. 981, 127 L. Ed. 2d 285 (1994), *quoting Southern Pacific Co. v. Jensen*, 244 U.S. 205, 216, 37 S. Ct. 524, 61 L. Ed. 1086 (1917); *Askew v. American Waterways Operators, Inc.*, 411 U.S. 325, 343, 93 S. Ct. 1590 (1973); *see also* Wyatt, M., *Navigating the limits of State Spill Regulations: How Far Can They Go?*, 8 U.S.F. Maritime L.J. 1 (1995).

8. The international watchkeeping "standard" referred to by the United States, and as expressed within STCW, bestows complete discretion for domestic implementation: "[The flag-state] shall require

(Cont'd)

II. OPA AMENDS AND/OR IMPLIEDLY REPEALS PREVIOUS FEDERAL STATUTES WHERE THE TWO ACTS ARE IN IRRECONCILABLE CONFLICT.

Central to both the United States' and Intertanko's argument is that Section 1018 addresses only the preemptive effect of "this Act," and not the preemptive effect of predecessor federal statutes. U.S. at 22. According to Petitioners, the provisions of PSWA/PTSA have preemptive effect on state regulations notwithstanding the language of Section 1018. This interpretation, however, would render the savings clause of Section 1018 (even as to liability for an oil spill) completely meaningless insofar as other statutes regulate the same activity. Elementary cannons of statutory construction, however, demand that federal statutes be harmonized to the extent possible. *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 155, 96

(Cont'd)
the master of every ship to ensure that watchkeeping arrangements are **adequate . . . taking into account the prevailing circumstances and conditions**." STCW Ch. VIII, Reg. VIII/2(2) (emphasis added). The United States alleges that the Coast Guard's implementing regulation requires two licensed officers on the bridge in certain waters. U.S. at 17. Petitioner fails to inform the Court that the federal regulation actually states: "Each tanker must navigate with **at least two** licensed deck officers on watch on the bridge, one of whom may be the pilot." 33 C.F.R. § 164.13(c) (emphasis added).

WAC 317-21-200(1)(a) perfectly reveals the local nature of the BAPs: "When the tanker is operating **in restricted visibility**, the navigation watch shall include at least **three** licensed deck officers, one of whom may be a state-licensed pilot . . . The vessel master or officer in charge shall determine periods of restricted visibility." *Id.* (Emphasis added). Not only does this BAP complement the Coast Guard regulation without conflict, it specifically complements the international requirement that the vessel officers shall determine when to entail the requirement, not the state. Rather than "fly additional personnel to the vessel" as the United States asserts, a tanker may effortlessly comply with this unique local regulation without any increase in the number of its crew.

S. Ct. 1989, 48 L. Ed. 2d 540 (1976) ("[W]hen two statutes are capable of co-existence, it is the duty of the courts . . . to regard each as effective").

As stated above, it is uncontested that at the very least OPA has reserved to the states the right to enact regulations relevant to liability without preemption. But if the savings clause is limited to "this Act" as suggested by Petitioners, state regulation even as to liability would nevertheless be preempted because other federal statutes and international treaties regulate liability for oil spills.[9]

The only reasonable interpretation, giving effect to the savings clauses of section 1018, is that the provisions of previous statutes which are in conflict with OPA are amended and implicitly repealed.

> [There are] two well-settled categories of repeals by implication — (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) if the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act.

Radzanower v. Touche Ross & Co., 426 U.S. 148, 154, 96 S. Ct. 1989, 48 L. Ed. 2d 540 (1976) (*quoting Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936)). In each of the two categories "the

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9. A variety of federal statutes (not listed above) regulate the liability of an oil spill. The Trans-Alaska Pipeline Authorization Act (TAPAA) establishes a comprehensive liability scheme applicable to damages resulting from the transportation of Trans-Alaska pipeline oil. 43 U.S.C. § 1653(c). In addition, the Clean Water Act (CWA) is a remedial statute intended to create a comprehensive plan to expedite oil pollution cleanup and allocate and limit liability. 33 U.S.C. § 1321; *Port of Portland v. Water Quality Ins. Syndicate*, 796 F.2d 1188, 1191 (9th Cir. 1986). Also, international liability regimes establish strict liability, but cap the liability. *See* Mitchell, *supra*.

intention of the legislature to repeal must be clear and manifest." *Id.*[10]

Congress has implicitly repealed other statutes concerning oil spill prevention and liability. In *In re Glacier Bay*, 944 F.2d 577 (9th Cir. 1991), the Court ruled that the Trans-Alaska Pipeline Authorization Act (TAPAA), 43 U.S.C. §§ 1651 *et seq.*, impliedly repealed the Limitation Act in reference to the liability for oil spills. The Court specifically reasoned that "[i]t is clear that TAPAA is a comprehensive liability scheme, which includes, as necessary elements, both strict liability and negligence principles." *Id.* at 582. The Court further reasoned that "the comprehensive nature of TAPAA can not be overemphasized." *Id.* at 583. "We can only conclude that TAPAA was designed to supersede any conflicting law; by TAPAA's nature, it was intended to become **the** controlling statute with regard to trans-Alaska oil spills." *Id.* (emphasis original).[11]

Like TAPAA, the comprehensive nature of OPA can not be overemphasized. OPA was intended to become the controlling statute with reference to oil tanker spill prevention and liability. "[w]hat the Nation needs is a package of complementary international, national, and State laws . . . Instead, there is [currently] a fragmented collection of Federal and State laws." OPA 90, Sen. Rept. No. 101-94, 2, July 28, 1989. Section 1018(c) of OPA authorizes the states to "impose any additional liability or additional requirements . . . relating to the discharge,

10. *See Morton v. Mancari*, 417 U.S. 535, 550, 94 S. Ct. 2474, 2482, 41 L. Ed. 2d 290 (1974) (implied repeal where the statutes at issue are irreconcilable); *Gordon v. New York Stock Exchange*, 422 U.S. 659, 682-83, 95 S. Ct. 2598, 2611-12, 45 L. Ed. 2d 463 (1975) (implied repeal where there exists "plain repugnance" between the statutes).

11. Implicit repeal need not be absolute. "[W]hen two statutes are partially in conflict, '[r]epeal is to be regarded as implied only if necessary to make the [later enacted law] work, and even then only to the minimum extent necessary.' " *Glacier Bay*, at 582 *quoting Silver v. New York Stock Exchange*, 373 U.S. 341, 357, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963). Although repeals by implication are not favored, they will be found when "the new statute is clearly repugnant, in words or purpose, to the old statute. . . ." *Id.*

or substantial threat of discharge, of oil." OPA is in irreconcilable conflict with PSWA/PTSA and Title 46 insofar as these acts purport to preempt state regulations. OPA saves state regulation from preemption.

III. FEDERAL CASE LAW SUPPORTS THE AUTHORITY OF THE STATES TO ENACT REASONABLE ENVIRONMENTAL REGULATIONS TO PREVENT AN OIL SPILL.

A. *Ray v. Atlantic Richfield* is limited to design and construction and supports the rights of the states to enact reasonable environmental regulations.

In *Ray v. Atlantic Richfield Company*, 435 U.S. 151, 98 S. Ct. 988, 55 L. Ed. 2d 179 (1978) the Court considered a challenge to the Washington Tanker Law, which regulated the "design, size, and movement of oil tankers in Puget Sound. . . ." *Id.* at 993. Allegedly, the Washington law was preempted by the PWSA/PTSA.

The Court in *Ray* began its analysis with "the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 994. As articulated above, Congress has not expressed a clear and manifest purpose to supersede Washington's historic police powers to enact environmental regulations to prevent an oil spill. Section 1018 of OPA is an expression explicitly to the contrary.

The Court in *Ray* ruled that Congress intended to foreclose state regulation of tanker design and construction. *Id.* at 997. The Court, however, recognized the state's right to enact "reasonable, nondiscriminatory conservation and environmental protection measures. . . ." *Id.* at 997. The Court's ruling in *Ray* was clearly limited to design and construction.

> Of course, that a tanker is certified under federal law as a safe vessel insofar as its design and construction characteristics are concerned does not mean that it is free to ignore otherwise valid

> state or federal rules or regulations that do not constitute design or construction specifications.

Id. at 1000.

Washington's BAP regulations are not concerned with design and construction, and are simply "reasonable, nondiscriminatory conservation and environmental protection measures." As noted above, it is undisputed that compliance with both federal and state regulations is not a physical impossibility. In addition, the BAP regulations do not stand as an obstacle to the full purposes and objectives of Congress; to the contrary they promote the objectives of Congress to prevent oil spills.

B. Federal Courts have consistently limited *Ray* to design and construction.

In *Chevron v. Hammond*, 726 F.2d 483 (9th Cir. 1984), *cert. denied*, 471 U.S. 1140 (1985), the Court addressed whether Alaska's environmental regulations prohibiting the operational discharge of oil in Alaska's water was preempted by Coast Guard regulations. Although the court considered a different statute than now under consideration, the CWA, the Court in *Chevron* ruled on many of the issues now presented to the Court.

Specifically, the Court reviewed a broad spectrum of federal statutes and international conventions which it was claimed occupied the field. The Ninth Circuit concluded otherwise.

> The above authorities demonstrate a congressional intent that there be joint federal/state regulation of ocean waters within three miles of shore. Such joint regulation undermines the argument that Congress in enacting the PWSA/PTSA implicitly intended to occupy the field of regulating tanker pollution in a state's territorial waters

Id. at 489-490. The Court further recognized "a well-settled congressional policy to promote a state's more stringent regulation of the local marine environment." *Id.* at 491. After reviewing the comprehensive legislative scheme, the Court concluded "that Congress has indicated emphatically that

there is no compelling need for uniformity in the regulation of pollutant discharges — and that there is a positive value in encouraging the development of local pollution control standards stricter than the federal minimums." *Id.* "Here, in fact, the local community is more likely competent than the federal government to tailor environmental regulation to the ecological sensitivities of a particular area." *Id.* at 493.

The argument that the comprehensiveness of the legislative scheme evinces an intent to preempt was rejected. "The complexity and comprehensiveness of federal marine environmental regulation are particularly appropriate without regard to the question of preemption because these regulations must 'be sufficiently comprehensive to authorize and govern programs in States which had no . . . requirements of their own as well as cooperatively in States with such requirements.' " *Id.* at 492.

Contrary to Intertanko's contention, neither *Chevron* nor other federal case law support the proposition that states may only engage in the regulation of "secondary" or "off-the-ship" aspects of maritime activity. Indeed, *Chevron* holds precisely the opposite. *See also Huron Portland Cement Co. v. City of Detroit*, 362 U.S. 440, 80 S. Ct. 813, 4 L. Ed. 2d 852 (1960) (state regulation of a vessel's on-board operations to prevent air pollution); *Ballard Shipping Co. v. Beach Shellfish*, 32 F.3d 623, 629 (1st Cir. 1994) ("State regulation of **primary conduct** in the maritime realm is not automatically forbidden. . . .") (emphasis added).

The *Chevron* Court also considered the effect of the local statute on international affairs, and distinguished those valid concerns with tanker design from those relevant to environmental issues.

> Although national uniformity and international consensus are critical concerns in the establishment of tanker design standards, those concerns are not essential in the regulation of pollutant discharges into coastal waters. Once a

> ship is constructed, it cannot meet new or different design requirements in various ports.

Id. at 493. The overall nature of the environmental regulatory scheme has not changed. Prevention of oil spills and deference to traditional state police powers continues to dominate considerations of illusory uniformity.

In *Chevron*, the Court explicitly limited the holding of *Ray* to "design characteristics", and acknowledged the obligation of tankers to meet otherwise valid state regulations that do not constitute design or construction specifications.

> The Court's finding of preemption is specifically limited to the regulation of vessel "design characteristics" and thus does not control the outcome of the present case involving ocean pollutant discharges. As a matter of fact, the court specifically explained that tankers must meet "otherwise valid state or federal rules or regulations that do not constitute design or construction specifications." 435 U.S. at 168-69, 98 S.Ct. at 999-1000.

Id. at 487.[12]

In *Berman Enterprises v. Jorling*, 793 F. Supp. 408 (E.D.N.Y. 1992) the plaintiffs claimed that the New York Environmental Conservation Law was preempted by operation by the PWSA as amended and subject to Coast Guard regulation. *Id.* at 414. The Plaintiffs in *Berman* also relied upon *Ray* to support its contention of conflict and field preemption. *Id.*

The *Berman* court rejected Plaintiffs' claim of preemption and their reliance on *Ray*. "Contrary to plaintiffs' view, *Ray*

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12. Intertanko refers the Court to the dissent by Justice White in the denial of certiorari in *Chevron*. Intertanko at 18, n.19. The remarks by Justice White must be kept in context. His analysis was made long before the Congressional objectives and purposes behind oil spill prevention measures had been fundamentally altered by OPA 90. Justice White's analysis is constrained to the facts and Congressional actions before the Court in 1985 and does not provide a "ripened" opportunity to revisit *Chevron*.

indicates how far the Supreme Court is willing to go to allow local regulation of oil tanker activity." *Id.* at 415 (Citing L. Tribe, *American Constitutional Law*, § 6-28, at 487 (2d ed. 1988)). In response to Plaintiffs' claim of conflict preemption, the Court in *Berman* again relied upon *Ray* and ruled that only an **actual conflict** between state and federal law could result in preemption.

> *Ray*, however, only invalidated state provisions where there was an actual conflict between state and federal law. Where there was no such conflict, the Court steadfastly refused to infer preemption in the field of environmental protection, an area that lies at the core of the states' police powers.

Id. at 415-416. In the case at bar, there is no actual conflict.

The court in *Berman* explicitly recognized that states are authorized to exercise their historic police powers not only after the oil hits the water, but to **prevent** oil spills in the first instance. "*Ray* specifically allowed for statutes that are designed to protect the environment against imminent (or even non-imminent) harms." *Id.* at 417. A more eloquent statement of the necessity for local regulation is hard to imagine.

> Plaintiffs in effect are asking the federal courts to tell New York that it may not, in the exercise of its police powers, plan against the desecration of its waters and coast that would otherwise surely result from the high volume of oil barge traffic on the state's waterways. Plaintiffs would instead have the state rely entirely on distant and overextended officials in Washington, D.C. for basic environmental protections. Such an ineffective scheme is not contemplated by the federal Constitution.

Id. at 416-417.

The court in *Berman* explicitly considers the effect of the non preemption provisions of both the CWA and OPA 90 and acknowledges that if there were otherwise any doubt about

preemption, these acts "settle the issue." *Id.* at 416. After quoting both acts, the Court concluded that "[f]ar from being preempted, [New York] accepts the federal government's invitation to provide additional means of enforcing the federal policy favoring clean water." *Id. See also Ballard Shipping Co. v. Beach Shellfish*, 32 F.2d 623 (1st Cir. 1994) (upholding state law despite the existence of a direct conflict between state law and maritime law).

C. Hypothetical conflicts are insufficient to justify preemption.

Petitioners champion the cry of balkinization in support of an argument that the BAPs threaten the stability of our nation's shipping interests, both domestically and abroad. Intertanko at 18, U.S. at 29. This argument is not only hypothetical, but it ignores the genius of federalism in the environmental context. The right of Washington to enact oil spill regulations to protect its sovereign waters concurrently and complementary with the federal government is critical to a balance of federalism necessary to allow individual states the autonomy envisioned by the Tenth Amendment. The record below is completely devoid of any evidence to suggest that unsafe balkinization is, or will, occur. In "areas of coincident federal and state regulation, the 'teaching of [the] Court's decisions . . . enjoin[s] seeking out conflicts between state and federal regulation where none clearly exists.' " *Seagram & Sons v. Hostetter*, 384 U.S. 35, 45, 86 S. Ct. 1254, 16 L. Ed. 2d 336 (1966), *overruled on other grounds*. Congress made a judgment in OPA 90 that prevention of oil spills takes priority over uniformity and reciprocity. Petitioners may not agree with that judgment, but it is not the function of the Petitioners or this Court to second guess the wisdom of Congress.

IV. THE ALLEGED EXPRESS PREEMPTION BY THE U.S. COAST GUARD HAS EXCEEDED THE SCOPE OF ITS ADMINISTRATIVE AUTHORITY.

Intertanko asserts that the Coast Guard has expressly preempted several of the BAP regulations at issue. *See*

Intertanko at 22-24. This argument was specifically rejected by the Ninth Circuit. *Intertanko II*, at 1068. Where statutory language clearly authorizes state regulation without preemptive effect, an agency regulation to the contrary is entitled to no deference. The U.S. Coast Guard has no greater authority than granted under the terms of the statute itself.

> An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do.

Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374, 106 S. Ct. 1890, 90 L. Ed. 2d 369 (1986).[13]

Although deference to administrative agencies in some cases is appropriate, federal courts should not allow deference to "slip into a judicial inertia" and "rubber stamp" administrative determinations. *Bureau of Alcohol, Tobacco & Firearms v. FLRA*, 464 U.S. 89, 97, 104 S. Ct. 439, 78 L. Ed. 2d 195 (1983). This deference is especially inappropriate where agency action "is premised on its understanding of a specific Congressional intent . . . [which is] the quintessential judicial function of deciding what a statute means." *Id.* at 98, n.8. *See also Trustees of California State University v. Riley*, 74 F.3d 960, 963 (9th Cir. 1996) ("In reviewing an agency's construction of a statute,

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13. *See also Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843, 104 S. Ct. 2778, 81 L. Ed. 2d 694 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress"); *Medtronic v. Lohr*, 518 U.S. 470, 512, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996) (O'Connor, J., concurring and dissenting) ("It is not certain that an agency regulation determining the preemptive effect of any federal statute is entitled to deference, [citation omitted] but one pertaining to the clear statute at issue here is surely not. . . . Where the language of the statute is clear, resort to the agency's interpretation is improper").

the court must reject those constructions that are contrary to clear Congressional intent or frustrate the policy that Congress sought to implement").

In the case at bar, Congress has spoken to the precise issue in question. The statute itself and/or the legislative history makes it clear that Congress intended to allow the states to implement protective regulations to prevent oil spills within their jurisdiction. The Coast Guard's determination to the contrary "is premised on its understanding of a specific Congressional intent," and therefore is entitled to little deference. The Coast Guard "may not confer power upon itself." *See Louisiana Pub. Serv. Conn'n v. FCC, supra.* OPA 90's statutory language and the lengthy Congressional history makes clear that Congress intended to allow the states to regulate in the area of oil spill prevention without fear of preemption. The Coast Guard's determination of the preemptive effect of its regulations is simply beyond its authority and has no effect.

A. The Coast Guard's interpretation is entitled to no deference in light of it inconsistent positions.

Even the Coast Guard has explicitly recognized the right of the states to regulate for the prevention of oil spills. In a memorandum dated August 18, 1992 the Coast Guard Commandant, J.W. Kime, states:

> The Oil Pollution Act of 1990 (OPA 90) has been with us for over two years now. The act materially altered the nature of the relationship between the Coast Guard and the states in the marine environmental protection (MEP) arena. **States now have the opportunity for a more active role in pollution prevention, response, access to the Oil Spill liability Trust Fund (the fund), and freedom to regulate in areas historically reserved to federal agencies.**

Supp. Excerpts at 774 (emphasis added). In a memorandum dated May 19, 1993 from A. E. Henn, Chief, Office of Marine

Safety, Security and Environmental Protection, the Coast Guard acknowledged:

> The Oil Pollution Act of 1990 (OPA 90) specifically affirmed the rights of states to protect their marine environment.
>
> . . .
>
> Several states have been extremely pro-active in developing programs that may differ somewhat from our Coast Guard policies and may exceed our mandates and regulations. **OPA 90 did not preempt states rights**, and, in our efforts we must be committed to work together to complement rather than duplicate. Should Federal preemption of a state mandate become necessary, it will become a complex legal issue.

Supp. Excerpts at 687 (emphasis added).

Where a federal agency asserts differing policies on the issue of preemption, any deference to which they might otherwise be entitled evaporates. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447, n.30, 107 S. Ct. 1207, 94 L. Ed. 2d 434 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency held view"); *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L. Ed. 2d 80 (1981) ("The Department's current interpretation, being in conflict with its initial position, is entitled to considerably less deference"); *General Electric Co. v. Gilbert*, 429 U.S. 125, 143, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976) ("We have declined to follow administrative guidelines in the past where they conflicted with earlier pronouncements of the agency").

V. THE DOCTRINE OF INNOCENT PASSAGE AND THE U.S./CANADIAN VESSEL TRAFFIC AGREEMENT WERE NOT PRESERVED FOR APPEAL.

The United States may mislead the Court by raising the doctrine of innocent passage and the Agreement for a Cooperative Vessel Traffic Management System for the Juan de Fuca Region (VTS Agreement), 32 U.S.T. 377. U.S. at 27, n.14, 28, n.15. These issues were never preserved for appeal before the District Court. *Intertanko II*, at 1063-64. Generally, a reviewing court has no authority to consider an issue not raised in the trial court. *Vargas v. United States Dep't of Immigration & Naturalization*, 831 F.2d 906, 907 (9th Cir. 1987); *Self Directed Placement Corp. v. Control Data Corp.*, 908 F.2d 462, 466 (9th Cir. 1990) (appellant must have adequately preserved issue at summary judgment before it can be considered on appeal).

There are three general exceptions to the rule on appeal preservation: 1) in the "exceptional" case in which review is necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process, 2) when a new issue arises while appeal is pending because of a change in the law, or when the issue presented is purely one of law and either does not depend on the factual record developed below, or 3) the pertinent record has been fully developed. *Bolker v. Commissioner of Revenue*, 760 F.2d 1039, 1042 (9th Cir. 1985). None of the three exceptions apply to the case at bar. An issue has not changed while the appeal is pending; review is not necessary to prevent a miscarriage of justice or to preserve the integrity of the judicial process; and most obviously, the parties have been deprived of the opportunity to develop a sufficient factual record. The United States's speculation about impairment to the right of innocent passage should not be indulged. Hypothetical conflicts are insufficient to justify preemption. *Seagram & Sons, supra*, at 45; *See also Barber v. State of Hawaii*, 42 F.3d 1185, 1189 (9th Cir. 1994).

A. The Strait of Juan de Fuca is comprised of internal waters.

Assuming for the sake of argument that innocent passage and/or the VTS Agreement was before the District Court, they do not preclude the BAPs within the Strait of Juan de Fuca. The Strait has historically been considered internal waters, thus not subject to the doctrine of innocent passage. All waters east of the entrance to the Strait consist of internal waters of British Columbia, the United States and the State of Washington.[14] In 1982, the U.S. Department of State "concur[red] in the conclusion that there is a sufficient historic claim to the Strait of Juan de Fuca as internal waters." *See also Re: Ownership of the bed of the Strait of Georgia*, 1 S.C.R. 388 (1984) (Canadian Supreme Court decision holding that Strait waters on the Canadian side are the historic, internal waters of British Columbia); Washington State Constitution, Art. XXIV, § 1; RCW 36.04 *et seq.* (prescribing that the territorial jurisdiction

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14. Intertanko includes Arts. 37, 44, and 45 of the United Nations Convention on the Law of the Sea ("UNCLOS") in their appendix (right of transit/innocent passage through international straits). Intertanko App. at 301a-302a. Although not cited in the Petition, this inclusion suggests that Intertanko may substantively argue that the Strait of Juan de Fuca is an "international strait" to which "transit passage" applies. Intertanko is mistaken. The Strait of Juan de Fuca does not meet the geographical qualifications for an "international strait" because, *inter alia*, it consists of internal waters. *United States v. Alaska*, 521 U.S. 1, 18, 117 S. Ct. 1888 (1997) ("the character of the strait depends on the character of the waters to which a it leads"). If the Court reaches the issues of innocent and/or transit passage, classification of the waters within the Strait will be a necessary prerequisite for a proper analysis.

The classification of Canadian Strait waters as internal has already been made by the Canadian Supreme Court. *See Re: Ownership of the Bed of the Strait of Georgia*, 1 S.C.R. 388 (1984). The lower Court did not address this issue; only this Court has the authority to classify the Strait as internal waters. There are two indispensable parties for the Court to reach this issue: the state of Washington and the United States, both of whom are before the Court.

for Washington counties bordering the Strait extends seaward to the international demarcation line).

Once a vessel enters the Strait of Juan de Fuca, it has entered the internal waters of Washington State. Although never presented before this Court, in 1993 the Coast Guard explicitly acknowledged that "U.S. waters in the Strait of Juan de Fuca are **internal waters** of the United States. Tankers transiting the internal waters of the U.S. are subject to [federal regulations]. The principle of innocent passage only applies to vessels transiting the territorial seas of the U.S." 58 FR 27629 (1993) (emphasis added). As internal waters, any applicable international rules and regulations governing vessel operating procedures may not preempt reasonable, police power interests of the State. *See United States v. Alaska*, 521 U.S. 1, 5, 117 S. Ct. 1888 (1997).

Under the Submerged Lands Act, 43 U.S.C. §§ 1311 *et seq.* ("SLA"), internal waters provide a state with ownership of not only the submerged lands, but the natural resources within the water column. *United States v. California*, 436 U.S. at 39, 40, 98 S. Ct. 1662, 56 L. Ed. 2d 94 (1978) (the SLA implicates both "submerged lands and waters"). Therefore, the state owns the Strait waters concurrently with the United States. While the United States may prescribe navigational regulations over these waters, concurrent state regulations co-exist pursuant to the Tenth Amendment; "state ownership of submerged lands — which carries with it the power to control navigation, fishing, and other public uses of water — is an essential element of sovereignty." *United States v. Alaska*, *supra* at 5, *citing Utah Div. of State Lands v. United States*, 482 U.S. 193, 195, 107 S. Ct. 2318, 96 L. Ed. 2d 162 (1987). Internal waters "are subject to the complete sovereignty of the nation, as much as if they were a part of its land territory, and the coastal nation has the privilege even to exclude foreign vessels altogether." *United States v. Louisiana*, 394 U.S. 11, 22, n.24, 89 S. Ct. 773, 780 (1969).[15]

15. The historical internal waters status of the Strait of Juan de (Cont'd)

VI. THE BAPS DO NOT IMPAIR THE FOREIGN RELATIONS POWER OF THE UNITED STATES.

Petitioners disingenuously argue that the BAPs jeopardize the ability of the United States to speak with one voice on the international level and impairs U.S. treaty making credibility.[16] These arguments are not new to perceived international impacts of OPA § 1018. Graver concerns were expressed throughout the entire international community over OPA's promotion of non-uniform liability regimes, and the very real prospect of oil tankers facing state regimes which impose unlimited liability.[17]

(Cont'd)
Fuca is more relevant to the case at bar than the doctrine of innocent passage. If the Strait consists of territorial or international waters as the Petitioner's suggest, foreign warships could enter the Strait at will and unimpeded. TSC Art. 14; UNCLOS Arts. 17, 21. "According to Article 21 of [UNCLOS] the coastal [nation] does have the right to impose certain rules and regulations in regard to innocent passage, but it may not hamper, deny or impede the innocent passage of warships." Larson, D., *National Security Aspects of the United States Extension of the Territorial Sea to Twelve Nautical Miles*, 2 Territorial Sea Journal 189, 205 (1992).

16. Petitioners point to European nations which jointly commented on the BAPs, and to numerous law review articles addressing the cases below. U.S. at 26-27, Intertanko at 17, n.18. Contrary to assertions by the United States, there is no authority for the proposition that foreign diplomatic comments are entitled to deference by the Court. Moreover, the cited law review articles do not collectively champion the renunciation of the BAPs.

17. *See, e.g.*, Cooney, M., *The Stormy Seas of Oil Pollution Liability: Will Protection and Indemnity Clubs Survive?*, 16 Houston J. of Int'l L. 343, 347 (1993) ("transportation of oil to the United States could be severely disrupted . . ."); Eubank, S., *Patchwork Justice: State Unlimited Liability Laws in the Wake of the Oil Pollution Act of 1990*, 18 MD. J. Int'l L. & Trade 149, 150 (1994) ("[t]he fear of unlimited liability at the state level has generated . . . threats of trade-based retaliation against the United States"); Wilkinson, C., *et al.*, *Slick Work: An Analysis of the Oil Pollution Act of 1990*, 12 J. Energy, Nat. Resources & Envt'l L. 181, 235 (1992) ("[r]epresentatives of the oil transportation industry threaten to stop moving oil through United States ports unless they receive some relief from exposure to unlimited liability").

Specifically, OPA 90 arguably posed a threat to the stability of the international oil tanker insurance industry. Many critics cried that OPA's provision for unlimited state liability posed a real threat to future oil commerce within the United States. These arguments proved to be false; the oil shipping industry adjusted.[18] Any perceived impacts of the BAPs on international shipping pale in comparison to the financial threats posed by OPA's introduction of the potential for unlimited state liability regimes.

A. The BAPs are not preempted by the Foreign Affairs Clause.

The only case in which the Supreme Court has struck down a state statute as violative of the foreign affairs power is *Zschernig v. Miller*, 389 U.S. 429, 88 S. Ct. 664, 19 L. Ed. 2d 683 (1968). *Zschernig* involved an Oregon statute providing that a nonresident alien could not inherit from an Oregon decedent unless certain conditions were met. *See id.* at 440. The Supreme Court struck down the Oregon statute on the ground that it had "**more than 'some incidental or indirect effect** in foreign countries.' " *Id.* at 434 (*quoting Clark v. Allen*, 331 U.S. 503, 516-17, 67 S. Ct. 1431, 91 L. Ed. 1633 (1947)) (emphasis added).

A state statute with international implications is valid if it provides no discretion for state administrative officials "to comment on, [or] key their decisions to, the nature of foreign relations." *Id.* In order for a state regulation to frustrate U.S. foreign policy, its application must have more than an "incidental or indirect" effect on the foreign affairs of this country. *Zschernig*, at 434; *see also Clark*, at 516-17; *Trojan Technologies, Inc. v. Commonwealth of Pennsylvania*, 916 F.2d 903, 913 (3rd Cir. 1990), *citing Zschernig* ("[o]n only one occasion has the Supreme Court struck down a statute as violative of the foreign relations power")

18. "The international operators . . . threatened decreased vessel availability for U.S. trades. . . . The doomsday predictions have, however, not come to pass and, indeed, new insurers and consortiums have emerged." Wyatt, *supra* at 25, n.181.

As the Ninth Circuit aptly noted, "Intertanko fail[ed] to point to any evidence in the record to establish that any "incidental burden[ ] on interstate and foreign commerce [is] clearly excessive in relation to the putative local benefits." *Intertanko II*, at 1069. In addition, both Petitioners failed to provide the Ninth Circuit with any evidence that even if the BAPs have an extraterritorial impact, that impact is anything more than "incidental or indirect." *Id.*

CONCLUSION

The decision below was a correct application of settled law. Moreover, the Ninth Circuit interpretation of OPA § 1018 was a case of first impression throughout the federal circuits; no circuit conflict exists to be resolved by the Court. The Petitioners' requests for certiorari should be denied.

Respectfully submitted,

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